MEMORANDUM DECISION
SUPREME COURT - STATE OF NEW YORK
Present: HON. RALPH P. FRANCO, Justice

LARRY LABARBERA and JULIA LABARBERA

Plaintiff(s),

-against-

EP & M ENTERPRISE, LTD. and FASCO ASPHALT PAVING, INC.,

Defendant(s)

TRIAL/IAS, PART 11
NASSAU COUNTY

INDEX No. 11115/98
MOTION SEQ. 4

The following papers read on this motion:
Notice of Motion/ Order to Show Cause.....
Answering Affidavits.....
Replying Affidavits.....

Motion by defendant Fasco Asphalt Paving, Inc. (Fasco) for summary judgment dismissing plaintiff's complaint and all cross claims as to said defendant pursuant to CPLR 3212 is determined as hereinafter provided.

Plaintiff Larry Labarbera was allegedly injured on June 1, 1997 when he tripped and fell in a hole on the lawn side of the curb perimeter adjacent to the parking lot of the HBO Building located at 300 New Highway, Hauppauge, New York where he was employed. Prior to the accident, plaintiff and a co-worker were tossing an aerobie (similar to a frisbee) during a work break on the front lawn of the HBO building in the vicinity of the newly paved parking lot in front of the building.

As plaintiff attempted to return the aerobie to his car, which was parked on the driveway along the curb, his right foot stepped into a hole appropriately 16 to 18 inches deep, 1 1/4 to 1 ½ feet in diameter and semi-circular in shape, located in the grass abutting what plaintiff describes as "one of the newly installed curbs."

Defendant Fasco, hired by HBO to replace/restore the parking lot, curbs and walkways at the subject location, seeks summary judgment dismissing the complaint on the ground that it neither created nor had notice of the allegedly defective condition. Moreover, it had no duty regarding any trench hole or similar condition which may have existed on the date of the accident because a landscaper was hired for the specific purpose of backfilling the holes after the concrete was laid.

To establish a *prima facie* case of negligence, the plaintiff must demonstrate that defendant created the condition which caused the accident or had actual or constructive notice of it. *Bykofsky v Waldbaum's Supermarkets*, 210 AD2d 280, 281 [2nd Dept 1994]. To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it. *Gordon v American Museum of Natural History*, 67 NY2d 836, 837. Where, however, defendant is responsible for causing or creating a dangerous condition, neither actual or constructive notice need be proven. *Schnur v City of New York*, 298 AD2d 332

[1st Dept 2002].

On a motion for summary judgment, the movant bears the burden of establishing its entitlement to summary judgment as a matter of law by the tender of evidence sufficient to eliminate any material issues of fact from the case. The failure to make such a showing requires denial of the motion regardless of sufficiency of the opposing papers. *Rentz v Modell*, 262 AD2d 545, 546 [2nd Dept 1999]. Even the color of a triable issue of fact forecloses the remedy. *Benincasa v Garrubbo*, 141 AD2d 636, 637 [2nd Dept 1988]. Moreover, in deciding a summary judgment motion, the evidence must be construed in a light most favorable to the party opposing the motion. *Rifenburgh v Wilczek*, 294 AD2d 653, 655 [3rd Dept 2002].

Here, it cannot be said that the movant has established entitlement to summary judgment. The record at bar raises factual issues as to whether defendant Fasco created the alleged defective condition which caused plaintiff's injury, whether it was, or was not, obligated to backfill the area after the curbing was installed and whether it failed to properly do so. Such issues cannot be summarily decided on the present state of the record which contains only the conclusory and self-serving allegations of defendant Fasco.

Plaintiff's claims, predicated on violations of Labor Law §241(6) and §200(1) contained in the second and third causes of action of the complaint, cannot be

sustained as plaintiff was not a worker engaged in any activity protected under said sections of the statute.

Notwithstanding plaintiff's argument regarding the untimeliness of defendant Fasco's motion, in the exercise of discretion afforded this court pursuant to CPLR 3212(a) (*Gonzalez v 98 Mag Leasing*, 95 NY2d 124, 129), the motion has been considered and is hereby denied in all respects except that the second and third causes of action asserted in the complaint are dismissed.

A **Certification** Conference shall be held before me on **October 29, 2003, 9:00 A.M.,** at which time counsel for each party familiar with the case must be present and certify to the Court that discovery has been completed, settlement discussions have been unsuccessful and the case is ready for trial.

Failure to comply with the terms and conditions of this Order may result in **sanctions.**

Attorney for Plaintiff is to serve a copy of this Order, with Notice of Entry, on all counsel.

Dated September 25, 2003

11115.4

Hon. Ralph P. Franco, JSC

ENTERED

SEP 29 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE